

A Joint CENDI/FLICC/FADGI Workshop Series
Issues and Answers in Digitization
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Before You Digitize – What Are the Legal Issues?

Copyright, Data Rights and Permissions in Government Works

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Approved for Public Release
U.S. Government Work (17 USC
§105) Not copyrighted in the U.S.



Goal for this Presentation

- This presentation discusses U.S. Government works
 - Published by the federal government
 - Authored by federal employees
 - Funded by the federal government
- It all depends on the specific item



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Crucial factors to consider

- What are the legal issues to consider
 - Is there a copyright
 - If there is, do I have data rights?
- What practical issues
 - What is my audience?
 - Do digital copies exist?



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Is it under copyright?

Non federal publications

- All publications prior to 1923 are out of copyright
- Between 1923 – 1963, copyright needs to have been renewed
 - Copyright Renewal database
 - <http://collections.stanford.edu/copyrightrenewals/bin/page?forward=home>



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US Copyright Law & the Berne Convention

- US ratified in 1989
 - Leading multilateral treaty on copyright
 - 130 countries
- Based on the principle of national treatment
 - Countries are obliged to grant the same protection to foreign works that they grant to domestic works.
- Sets minimum standards of protection
 - No formalities required
 - Copyright exists at time of fixation
 - Notice is voluntary
 - Registration is not necessary
 - In general, the term of protection is 70 years plus life of the author



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Pre Berne vs. Post Berne

- Pre Berne
 - A copyright marking © and registration were required
 - Federal publications presumed to be non-copyrighted unless marked
- Post Berne
 - Copyright exists as soon as it is fixed in a permanent medium
 - A government publication may be under copyright

US Government Publications before 1988

- The law discussed government publications not employees of the government
- Government Publications not copyrighted
- Exception - if the government publications was specifically marked as copyrighted
- Commercial publications containing non-copyrighted government works were required to note that fact



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US Government Publications after 1988

- No blanket exemption from copyright for federal publications
- The work of federal employees can not be copyrighted
- Federally commissioned works may be copyrighted but the government normally has data rights
- Works resulting from federal grants to non-federal employees are copyrighted

Post Berne - Government Exception

Copyright exists when fixed in a tangible medium

EXCEPT:

17 USC 105

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

A work of the “United States Government” is a work prepared by an officer or employee of the United States government as part of that person’s official duties.



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Joint Federal – Non-Federal Authorship

- If a work has multiple or joint authors, each author has an undivided interest in the work.
 - (The relatively rare exception is where the work clearly delineates that specific authors are the sole authors of specific sections of the work)
- In a work of joint federal & non-federal authorship
 - a non-federal author may claim copyright protection
 - The federal author's can't claim copyright and puts the contents of that work of joint-authorship into a non-copyrighted state
- The publisher supplied content is copyrightable



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Current Situation

- Federal publications of works by federal authors aren't copyrighted
- Commercial publication of a federal author
 - text is non-copyrightable
 - publisher added material is copyrightable
- Federal publications by non-federal author is copyrightable
 - Government may have government purpose rights (FAR/DFAR)
- Federally funded research is copyrightable
 - Government often has federal purpose rights



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USDA

Contracted Publications

- The wording of each contract takes precedence.
- The default governing rules for all federal procurement are the Federal Acquisitions Regulation (FAR) and the Defense supplement (DFARS)



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Data Rights

- Under the FAR general data rights clause (FAR 52.227-14), except for works in which the contractor asserts claim to copyright,
 - the Government has unlimited rights in all data first produced in the performance of a contract and all data delivered under a contract unless provided otherwise in the contract.
 - The express written permission of the Contracting Officer is required before the contractor may assert or enforce the copyright in all other works first produced in the performance of a contract.
 - Whenever the contractor asserts claim to copyright in works other than computer software, the Government, and others acting on its behalf, are granted a license to reproduce, prepare derivative works, distribute, perform and display the copyrighted work.

Grant Funded Publications

- Most federal agencies have separate but similar language concerning grants
- For example the USDA regulation -
 - 7 CFR 3019.36: *(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. The Federal awarding agency(ies) reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so. and (c) The Federal Government has the right to: (1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and (2) Authorize others to receive, reproduce, publish, or otherwise use such data for **Federal purposes**.*



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Federal Purposes

- Storage in a non-public archive is permitted.
- Display and use by federal employees is permitted
- The interpretation can differ by agency
 - At USDA federal purpose does not extend to displaying the item to the general public.



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Who is your audience?

- Is it within the federal government?
 - The government purpose clause applies
 - You can digitize and display government funded works
 - You can digitize and display commissioned works
- Is it the general public?
 - Digitize and display if free of copyright, or
 - Data rights permit, or
 - Permission granted by the copyright holder



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Open Access Issues

- There is growing pressure to give open access to all federally funded research
- Grant funded articles are copyrighted
 - Don't digitize and display in “as published” form without permission
- NIH mandate
 - Dictated by Congress
 - Required posting of the final “as approved” text not “as published”
 - Allowed authors up to 12 months after publication to comply
 - Changed the terms of future not past grants
- Proposals before Congress (FRPPA) and appropriations bills may extend the NIH scheme to other agencies

Has someone else digitized the item?

Check major catalogs:

- Hathi Trust
 - <http://catalog.hathitrust.org/>
- Google Books
 - <http://books.google.com/>
- **DLF/OCLC Registry of Digital Masters**
 - <http://www.oclc.org/digitalregistry/>



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